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No. 81-2282

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1961

WESTERN CONFERENCE OF TEAMSTERS
PENSION TRUST FUND,
Petitioner,

vs.

FRANK MUMM,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

[redacted]

QUESTIONS PRESENTED

1. Do the federal courts have jurisdiction to review the reasonableness of pension plan eligibility rules of a jointly administered labor-management trust fund created pursuant to Section 302(c)(5) of the Labor Management Relations Act?

2. Where a pension plan's eligibility rule is identical to the rule which Congress has established for eligibility for Social Security disability benefits, may a court hold that the rule is unreasonable as a matter of law?

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No. 81-2283

IN THE SUPREME COURT

of the

UNITED STATES

October Term, 1981

WESTERN CONFERENCE OF TEAMSTERS
PENSION TRUST FUND,
Petitioner,
vs.
FRANK MUSIC,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Frank Music respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on October 26, 1981, and amended on April 16, 1982.

STATUTORY PROVISIONS INVOLVED

This case involves Section 302 of the Labor Management Relations Act of 1947, 61 Stat. 157, as amended (29 U.S.C. Section 186) and Sections 403, 404, 502 and 514 of the Employee Retirement Income Security Act of 1974, 88 Stat. 876, 877, 891, 897 (29 U.S.C. Sections 1103, 1104, 1132 and 1144), the pertinent provisions of which are set forth in Appendix A.

STATEMENT OF THE CASE

Respondent Frank Music, a twenty year participant in the Western Conference of Teamsters Pension Plan when he

suffered a disabling heart attack on November 6, 1975, complained that he was entitled to have his eligibility for disability benefits fixed as of the date of his disabling injury. On the date of his heart attack, Music satisfied all of the age, length of service and employer contribution requirements for a disability retirement benefit under the Plan. He asked the United States District Court to determine that he was entitled to have his benefit computed according to the Plan formula in effect on that date, which would have provided an amount equal to an age 65 retirement pension.

Petitioner Western Conference of Teamsters Pension Trust Fund contended that Music first became eligible for a disability retirement benefit on May 1, 1976, under a further requirement of the Plan that a participant "is receiving

Disability Insurance Benefits under the Federal Social Security Act." The Social Security Act required a waiting period of five full consecutive calendar months between the date an applicant was injured and commencement of Disability Insurance Benefits. The Trust Fund claimed that because of this waiting period requirement, Music was not yet eligible to receive a disability retirement benefit on January 1, 1976, when a Plan amendment reducing the level of disability retirement benefits was put into effect. Because of his age, 47, the amended Plan reduced Music's benefit to 55 percent of the age 65 retirement pension.

Music filed a complaint in the district court claiming jurisdiction under Section 302(e) of the Labor Management Relations Act of 1947, as an action to restrain violations of Section 302, and

under Section 502(e)(1) of the Employee Retirement Income Security Act of 1974, as an action brought by a participant to recover benefits due to him under the terms of his Plan, to enforce his rights under the terms of the Plan, to clarify his rights to future benefits under the terms of the Plan, and to enjoin acts and practices which violate the provisions of Title I of ERISA.[1/] Specifically, Music alleged that by refusing to award the larger benefit based upon the 1975 Plan, though his disability commenced and he was otherwise qualified in 1975, solely because he did not complete the waiting period until May 1976, the Trust Fund's trustees acted arbitrarily, capriciously and with disregard of their

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1/ Respondent alleged other grounds for jurisdiction which are not pertinent to this petition.

fiduciary duties, in violation of Sections 302(c) of the LMRA and Section 403(c)(1) of ERISA.

Cross motions for summary judgment were filed upon a stipulated statement of facts, and judgment was entered without opinion in favor of the Trust Fund. Music appealed successfully to the Ninth Circuit, which reversed on the grounds that delaying eligibility to completion of the five-month waiting period "bears no apparent rational relationship" to the purpose of providing financial benefits for permanently disabled employees. Petitioner's Appendix A, p. 8.

Section 302 prohibits payment of money by employers to an employee benefit trust fund on which union representatives serve as trustees, unless the trust is established "for the sole and exclusive benefit of the employee of such employer, and their families and

dependents." Section 302(c)(5). The Ninth Circuit said that trusts having eligibility requirements which do not have a reasonable basis or are arbitrary and capricious, or which are applied in an unreasonable manner, violate the requirement. Petitioner's Appendix A, p. 5.

The Ninth Circuit concluded that the Trust Fund might delay the final determination of eligibility until permanence could be confirmed by the waiting period, but that "it is the occurrence of the disabling injury which ultimately and fundamentally establishes the participant's right to the disability benefits which are ultimately paid." Petitioner's Appendix A, p. 9. Having decided the case under Section 302, the Court of Appeals found it unnecessary to reach Music's arguments under ERISA. Petitioner's Appendix A, pp. 5-6, 12, fn. 13.

REASONS FOR DENYING THE WRIT

Nine federal circuit courts of appeals, as listed in footnote 3 of the Petition, permit federal court review under Section 302 of acts of trustees alleged to be unreasonable. No circuit has expressly held otherwise. The issue was explicitly reserved in United Mine Workers, etc. v. Robinson (U.S. Supreme Ct. March 8, 1982) ___ U.S. ___, 50 U.S.L.Week 4288. A contrary ruling in this case would not alter the ultimate outcome, however, because the events of which respondent complained all occurred after the effective date of Sections 403, 404, 502 and 514 of the Employee Retirement Income Security Act of 1974, which conferred upon the federal courts exclusive jurisdiction to review complaints that employee benefit plan trustees breached their fiduciary duties.

NO FEDERAL APPELLATE COURT HAS FOUND A CONFLICT WITH THE RULE OF DECISION EXPRESSED BELOW

No conflict exists between the Ninth Circuit's decision in this action and this Court's recent opinion in United Mine Workers, etc. v. Robinson (U.S. Supreme Ct. March 8, 1982) ___U.S.___, 50 U.S.L. Week 4288. United Mine Workers concerns a challenge to eligibility rules established by the collective bargaining parties in a labor agreement. This Court held that Section 302(c)(5) of the LMRA imposed no reasonableness requirement on collective bargaining parties who adjusted benefit eligibility rules to gain a strike settlement. Rather than overruling the line of circuit court decisions permitting review of trustee action under the "arbitrary and capricious" standard, among which it cited Pete v. United Mine Workers of America Welfare & Retirement

Fund of 1950 (D.C.Cir. 1975) 517 F.2d 1275 (en banc) and Kosty v. Lewis (D.C. Cir. 1963) 319 F.2d 744, cert.den. 375 U.S. 964, this Court found that the discretion to determine eligibility requirements and benefit levels had not been delegated to the trustees. 50 U.S. L.Week at 4291.

The Court then reserved the question petitioner now seeks to raise in this case:

> "In NLRB v. Amax Coal Co., 453 U.S. 322, the Court held that in enacting § 302(c)(5) 'Congress intended to impose on trustees traditional fiduciary duties.' The Court did not decide, nor do we decide today, whether federal courts sitting as courts of equity are authorized to enforce those duties. It is, of course, clear that compliance with the specific standards of § 302(c)(5) in the administration of welfare funds is enforceable in the federal district courts under

> § 302(e) of the LMRA. See Arroyo v. United States, 359 U.S. 419, 426-427." United Mine Workers, etc. v. Robinson, 50 U.S.L.Week at 4291, fn. 12.

Petitioner suggests that this Court should exercise its discretion in this case to resolve a conflict among the circuit courts. It refers to two decisions of the First Circuit that arose out of the same litigation over alleged diversion of trust assets from the ILA-PRSSA Welfare Fund. Petition, p. 6, fn. 3. One of them, Bowers v. Ulpiano Casal (1st Cir. 1968) 393 F.2d 421, came after dismissal of an action against six persons, none of them trustees, who allegedly accepted money out of trust. The Court stated that Section 302(e) gave the federal courts jurisdiction to restrain "violations of basic structure, as determined by the Congress, not violations of fiduciary

obligations or standards of prudence in the administration of the trust fund." Id. at 424. The Court went on to say that, "Such structural violations would consist of contributions to a trust fund which was not established for the sole and exclusive benefit of employees and dependents; which did not hold payments in trust to pay, from principal or income, for such employees' medical care, pensions, illness, etc.; which did not set forth in writing the detailed basis of payment; which did not have equal representation of employees and employers with provisions for a neutral person or umpire; which did not contain provisions for an annual audit; or which did not have a separate trust for pension and annuity funds." Id. at p. 4, fn. 4.

The First Circuit did not discuss or disapprove of then-existing circuit

court decisions from the District of Columbia holding that trust actions which are unreasonable, arbitrary and capricious are not taken for "the sole and exclusive benefit of employees and dependents" and violate Section 302. See Danti v. Lewis (D.C.Cir. 1962) 312 F.2d 345; Kosty v. Lewis (D.C.Cir. 1963) 319 F.2d 744. The Court did not mention or take a position on the "arbitrary and capricious" standard, and it might well have viewed diversion of funds as an issue within an area of day-to-date trust administration which Section 302 was not intended to regulate. The Ninth Circuit has said in Alvares v. Erickson (9th Cir. 1975) 524 F.2d 156, 165, that federal courts "have recognized a distinction between actions involving 'structural' deficiencies in the relevant trust which cause it to violate the 'sole and

exclusive benefit' provision of § 302 (c)(5) and actions involving only questions of day-to-day fiduciary administration of welfare and pension funds. Section 302(e), these cases say, provides jurisdiction over the former but not the latter."

Bowers v. Moreno (1st Cir. 1975) 520 F.2d 843, the second of these First Circuit decisions, concerned claims against plan trustees, among others, arising out of the same alleged diversion of assets. Again, the Court did not confront the principal authorities in other circuits, among them Alvares v. Erickson, issued five months earlier, or the series of decisions from the District of Columbia Circuit cited at footnote 1 of Pete v. United Mine Workers of America Welfare and Retirement Fund of 1950, supra, 517 F.2d at 1278, the latter issued six months

earlier. Nor did it discuss whether eligibility rules which were unreasonable, arbitrary and capricious would violate Section 302.

With the exception of the Circuit Court for the District of Columbia and the Ninth Circuit, most circuits which have considered the question have done so since 1975, when the second Bowers opinion was written. The broad acceptance of federal jurisdiction by other circuits since then, as listed in footnote 3 of the petition, leaves one to wonder whether the First Circuit would now deny jurisdiction on facts parallel to those presented here. There is certainly no clear statement in the First Circuit of a rule contrary to the one applied by the Ninth Circuit below.

Section 302 has been amended three times since the District of Columbia Circuit first reviewed trustee actions

for reasonableness in Danti v. Lewis and Kosty v. Lewis. See 83 Stat. 133 (1969); 87 Stat. 314 (1973); and 92 Stat. 2021 (1978). No revision has limited the authority of the federal courts to give equitable relief from violation of Section 302(c), yet it cannot be assumed that Congress was unaware of these interpretations. On the contrary, the 1974 enactment of ERISA made federal court supervision of employee benefit plan trustees exclusive, as discussed further in the following pages.

Certainly this matter should not be remanded to the Ninth Circuit for reconsideration in light of United Mine Workers v. Robinson, since this Court has already noted the limits of that ruling. And even if the Court were to conclude that the First Circuit cases have created a conflict among the

circuits, the writ should be denied, since the Trust Fund has not demonstrated that the outcome would be different if this case were decided according to ERISA standards. See Gordon v. ILWU-PMA Benefit Funds (9th Cir. 1980) 616 F.2d 433, 438.

FEDERAL COURTS HAVE JURISDICTION TO REMEDY TRUSTEE ACTS WHICH ARE UNREASONABLE, ARBITRARY AND CAPRICIOUS UNDER THE GENERAL FIDUCIARY STANDARDS OF ERISA

All of the pertinent events in this case occurred after January 1, 1975, when Congress gave the federal courts concurrent jurisdiction over actions by a plan participant or beneficiary "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan," and

exclusive jurisdiction over actions by a participant, beneficiary or fiduciary "(A) to enjoin any act or practice which violates any provision of this Title or the terms of the plan, or (B) or obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this Title or the terms of the plan." Section 502(a) of ERISA, 29 U.S.C. Section 1132(a). Section 502(e)(1) of ERISA provides:

> "Except for actions under subsection (a)(1)(B) [2/] of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this Title brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of the

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2/ Section 502 is set out at length in Appendix A.

> United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section."

With exceptions not bearing on this action, Section 514 of ERISA has removed the supervision of employee benefit trust funds from the states by providing that "provisions of this title [I] and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b). This section shall take effect on January 1, 1975." 3/

3/ Section 4 (29 U.S.C. § 1003) is set out at length in Appendix A. Section 4(a) describes employee benefit plans maintained by employers or employee organizations engaged in commerce or in an industry affecting commerce. Section 4(b) exempts government plans, (Cont.)

Part 4 of Title I of ERISA, commencing with Section 401 (29 U.S.C. § 1101) establishes rules of behavior for plan trustees in terms similar to the "sole and exclusive benefit" language of Section 302(c)(5). Section 403(c)(1) of ERISA [29 U.S.C. § 1103(c)(1)] states with limited exceptions that "the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and

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church plans and certain others. In the district court, the parties stipulated that "the Pension Plan and Trust constitute an 'employee pension benefit plan' within the meaning of section 3(2) of the Employee Retirement Income Security Act of 1974 ('ERISA') [29 U.S.C. § 1002(2)] and are subject to the provisions of Title I of ERISA."

their beneficiaries and defraying reasonable expenses of administering the plan." Section 404(a) [29 U.S.C. § 1104(a)] reiterates, "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . for the exclusive purpose of: (i) Providing benefits to participants and their beneficiaries; and (ii) Defraying reasonable expenses of administering the plan . . . ."

Federal courts which have found a reasonableness requirement implicit in the "sole and exclusive benefit" language of Section 302 should find authority in ERISA to remedy acts by trustees which are unreasonable, arbitrary and capricious. See Gordon v. ILWU-PMA Benefit Funds (9th Cir. 1980) 616 F.2d 433. With federal law now occupying the field, the federal courts may also assume traditional equity power. "[T]he same 'arbitrary

and capricious' standard of review governs judicial supervision of trustees, regardless of the origin of the fiduciary duties." Morgan v. Laborers Pension Fund (N.D.Cal. 1977) 433 F.Supp. 518, 524.

Because the circuit court found that the eligibility rules of petitioner were arbitrary and capricious, the outcome should be the same regardless of the source of jurisdiction. Since ultimate review by this Court would be unlikely to produce a different result on the merits, the writ should be denied.

PETITIONER MISREPRESENTS THE HOLDING OF THE NINTH CIRCUIT, WHICH PERMITTED THE USE OF A FIVE-MONTH WAITING PERIOD TO DETERMINE PERMANENCE OF DISABILITY BUT NOT AS A CONDITION OF ELIGIBILITY.

The Ninth Circuit did not hold, contrary to the suggestion made in the second question presented for review by

the Trust Fund, that it was unreasonable to require completion of the five-month waiting period of the Social Security Act (see 86 Stat. 1340, 1350, 1351, 42 U.S.C. § 423) before paying disability benefits. It said simply that while the Trust Fund might have the right to delay commencement for five months, a participant was entitled to have his right to benefits fixed as of the date of the disabling injury.

Three reasons were given by the Trust Fund for delaying eligibility until receipt of Social Security disability insurance benefits: That a five-month waiting period was necessary to confirm permanence of the disability; that it would be more expensive for the trust fund to make its own determination of disability; and that temporary disability benefits from health plans or other insurance was available to most

employees during the waiting period. In response to the first, the Ninth Circuit stated, "The Trust Fund offers no reasons for transforming a waiting period which serves an evidentiary function into an eligibility requirement." Petitioner's Appendix A, p. 9. Concerning the second, the court stated:

> "As noted above, Music concedes that the pension plan can delay determination of the employee's eligibility while the medical determination of the injury's permanence is being made, but insists that eligibility should be retroactive to the date the disabling injury occurred once the determination has been made. The Trust Fund had not explained how making eligibility retroactive to the date the disabling injury occurred would impose any additional administrative burden on them." Petitioner's Appendix A, p. 10.

As to the argument concerning alternative temporary benefits, the Ninth Circuit noted that respondent was not seeking benefits for the five-month period: "Music is arguing only that his eligibility for benefits should be fixed as of the date of his disabling injury for purposes of determining whether he is covered under the 1975 plan or under the 1976 plan. The Trust Fund's argument does not address that issue." Petitioner's Appendix A, p. 11. [Emphasis in original.]

Petitioner seems to suggest that the decision below raises a substantial constitutional issue concerning validity of the scheme established by Congress for payment of disability insurance benefits under the Social Security Act. Since this case does not concern a claim under the Social Security Act, it is hard to follow petitioner's point.

This Court has held that the benefit scheme of the Social Security system does not give rise to vested property interests as do rights founded in contracts, saying "It is apparent that the noncontractual interest of an employee covered by the Act cannot be soundly analogized to that of the holder of an annuity, whose right to benefits is bottomed on his contractual premium payments." Flemming v. Nestor (1960) 363 U.S. 603, 610. By contrast, with respect to private pensions, even those not based on collective bargaining agreements, many courts now hold to "the modern view that the promise of a pension constitutes an offer which, upon performance of the required service by the employee, becomes a binding obligation." Hoefel v. Atlas Tack Corporation (1st Cir. 1978) 581 F.2d 1, 4 and citations therein.

Respondent did not challenge the utility of a five-month waiting period to determine permanence of a disability, but only the plan's right to reduce his benefits after he met all of the age, length of service, and employer contribution requirements and then suffered a disabling injury. This case has not reached the question whether it is rational to delay commencement of benefits until completion of the waiting period, as expressly noted by the Ninth Circuit. Petitioner's Appendix A, p. 11. The issue is raised prematurely and the writ should be denied.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied. If the petition is granted,

the Court should consider whether review under Section 403, 404 and 502 of the Employee Retirement Income Security Act of 1974 would produce an identical result.

Dated: July 7, 1982.

Respectfully submitted,
MOORE, SIZOO & CANTWELL

Stephen McKae
Counsel of Record
On Behalf of the
Respondent Above named

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APPENDIX A

Section 302 of the Labor Management Relations Act of 1947, 61 Stat. 157, as amended (73 Stat. 537, 87 Stat. 314), 29 U.S.C. §186, provides in pertinent part:

"(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend or deliver, any money or other thing of value---

"(1) to any representative of any of his employees who are employed in an industry affecting commerce;

* * * * *

"(b)(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or

accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

"(c) The provisions of this section shall not be applicable * * * (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): Provided, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement

or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon * * * and [the agreement] shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other

places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; * * *

"(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

"(e) The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 381 of Title 28

(relating to notice to opposite party) to restrain violations of this section, without regard to the provisions of section 17 of Title 15 and section 52 of this title, and the provisions of sections 101-115 of this title."

Section 4 of the Employee Retirement Income Security Act of 1974, 88 Stat. 839, 29 U.S.C. § 1003, provides in pertinent part:

"(a) Except as provided in subsection (b) and in sections 201, 301, and 401, this title shall apply to any employee benefit plan if it is established or maintained---

"(1) by any employer engaged in commerce or in any industry or activity affecting commerce; or

"(2) by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting

commerce; or

"(3) by both.

"(b) The provisions of this title shall not apply to any employee benefit plan if---

"(1) such plan is a governmental plan (as defined in section 3(32));

"(2) such plan is a church plan (as defined in section 3(33)) with respect to which no election has been made under section 410(d) of the Internal Revenue Code of 1954;

"(3) such plan is maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws;

"(4) such plan is maintained outside of the United States primarily for the benefit of persons substantially all of whom are nonresident aliens; or

"(5) such plan is an excess benefit plan (as defined in section 3(36)) and is unfunded."

Section 403 of the Employee Retirement Income Security Act of 1974, 88 Stat. 876, as amended (94 Stat. 1296, 1299, 1308), 29 U.S.C. §1103, provides in pertinent part:

"(a) Except as provided in subsection (b), all assets of an employee benefit plan shall be held in trust by one or more trustees. Such trustee or trustees shall be either named in the trust instrument or in the plan instrument described in section 402(a) or appointed by a person who is a named fiduciary, and upon acceptance of being named or appointed, the trustee or trustees shall have exclusive authority and discretion to manage and control the assets of the plan, except to the extent that---

"(1) the plan expressly provides that the trustee or trustees are subject to the direction of a named fiduciary who is not a trustee, in which case the trustees shall be subject to proper directions of such fiduciary which are made in accordance with the terms of the plan and which are not contrary to this Act, or

"(2) authority to manage, acquire, or dispose of assets of the plan is delegated to one or more investment managers pursuant to section 402(c)(3).

"(b) The requirements of subsection (a) of this section shall not apply---

"(1) to any assets of a plan which consist of insurance contracts or policies issued by an insurance company qualified to do business in a State;

"(2) to any assets of such an insurance company or any assets of a plan which are held by such an insurance company;

"(3) to a plan---

"(i) some or all of the participants of which are employees of described in section 401(c)(1) of the Internal Revenue Code of 1954; or

"(ii) which consists of one or more individual retirement accounts described in section 408 of the Internal Revenue Code of 1954, to the extent that such plan's assets are held in one or more custodial accounts which qualify under section 401(f) or 408(h) of such Code, whichever is applicable;

"(4) to a plan which the Secretary exempts from the requirement of subsection (a) and which is not

subject to any of the following provisions of this Act:

"(A) part 2 of this subtitle,

"(B) part 3 of this subtitle, or

"(C) title IV of this Act; or

"(5) to a contract established and maintained under section 403(b) of the Internal Revenue Code of 1954 to the extent that the assets of the contract are held in one or more custodial accounts pursuant to section 403(b)(7) of such Code.

"(6) Any plan, fund or program under which an employer, all of whose stock is directly or indirectly owned by employees, former employees or their beneficiaries, proposes through an unfunded arrangement to compensate retired employees for benefits which were forfeited by such employees under a pension plan maintained by a

former employer prior to the date such pension plan became subject to this Act.

"(c)(1) Except as provided in paragraph (2), (3) or (4) of subsection (d), or under section 4042 and 4044 (relating to termination of insured plans), the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan."

* * * * *

Section 404 of the Employee Retirement Income Security Act of 1974, 88 Stat. 877, as amended (94 Stat. 1296), 29 U.S.C. § 1104, provides in pertinent part:

"(a)(1) Subject to sections 403(c) and (d), 4042, and 4044, a fiduciary shall discharge his duties with

respect to a plan solely in the interest of the participants and beneficiaries and---

"(A) for the exclusive purpose of:

"(i) providing benefits to participants and their beneficiaries; and

"(ii) defraying reasonable expenses of administering the plan;

"(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

"(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

"(D) in accordance with the docu-

ments and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title or title IV."

* * * * *

Section 502 of the Employee Retirement Income Security Act of 1974, 88 Stat. 891, as amended (94 Stat. 1295), 29 U.S.C. § 1132, provides in pertinent part:

"(a) A civil action may be brought--

"(1) by a participant or beneficiary---

"(A) for the relief provided for in subsection (c) of this section, or

"(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

"(2) by the Secretary, or by a

participant, beneficiary or fiduciary for appropriate relief under section 409;

"(3) by a participant, beneficiary, or fiduciary, (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;

"(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 105(c);

* * * * *

"(d)(1) An employee benefit plan may sue or be sued under this title as an entity. Service of summons, subpoena, or other legal process of a court upon a trustee or an adminis-

trator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

"(2) Any money judgment under this title against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this title.

"(e)(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

"(2) Where an action under this title is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

"(f) The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action."

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Section 514 of the Employee Retirement Income Security Act of 1974, 88 Stat. 896, 29 U.S.C. § 1144, provides in pertinent part:

"(a) Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b). This section shall take effect on January 1, 1975.

"(b)(1) This section shall not

apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

"(2)(A) Except as provided in subparagraph (B), nothing in this title shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking or securities.

"(B) Neither an employee benefit plan described in section 4(a), which is not exempt under section 4(b) (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking

for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

"(3) Nothing in this section shall be construed to prohibit use by the Secretary of services or facilities of a State agency as permitted under section 506 of this Act.

"(4) Subsection (a) shall not apply to any generally applicable criminal law of a state.

"(c) For purposes of this section:

"(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable to the District of Columbia shall be treated as a State law rather than a law of the

the United States.

"(2) The term "State includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this title.

"(d) Nothing in this title shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 111 and 507(b)) or any rule or regulation issued under any such law."